

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Bky. No.: 04-32864
Chapter 7 Case

James Harold Jutz,
Darleen Mary Jutz,
Debtors.

**DEBTOR'S VERIFIED MEMORANDUM OF LAW IN RESPONSE TO
TRUSTEE'S OBJECTION TO EXEMPTIONS;
and
ALTERNATIVE REQUEST FOR CERTIFICATION TO THE
MINNESOTA SUPREME COURT**

The debtors respond to the trustee's objections to their exemptions, as follows:

1. Wages.

On review of their records, the debtors agree that the wages in the bank were more than 20 days old as of the May 11 petition date. Therefore, they withdraw that exemption claim.

2. Wedding ring and jewelry.

Although the debtors contend that wedding rings fit within the legislature's intended protections of clothing and household goods, they expect to settle with the trustee regarding the wedding ring prior to the hearing. Whatever the exempt status of that item, the "cheap jewelry" clearly fits into the category of clothing (adornments that are only selected to be worn on occasion rather than 24 hours every day) and are exempt. *See generally In re Fernandez*, 855 F.2d 218 (5th Cir. 1988).

The trustee also challenges the wearing apparel exemption as unconstitutional because there is no dollar or other objective limit on the exemption. By inference, his objection is based on Minn. Const. Art. 1, Section 12, which provides in part that "*A reasonable amount of property* shall be exempt from seizure or sale for the payment of any debt or liability." *In re Tveten*, 402 N.W.2d 551, 556 n.6 (Minn. 1987) (emphasis in *Tveten* opinion).

Under 28 U.S.C. § 2403(b), the Court is obligated to make a certification to the Minnesota Attorney General on this issue.

Under Minnesota constitutional jurisprudence, the Minnesota Supreme Court would not hold the exemption unconstitutional under these facts, which unlike *Tveten* clearly involve a “reasonable amount of property” exempted under the applicable statutory provision; nor would it entertain a separate hypothetical case in which a debtor might claim an unreasonable amount. “Our inquiry is, therefore, reduced to a consideration of the particular facts currently before the court.” *State v. Gray*, 413 N.W.2d 107, 113 (Minn. 1987) (declining to entertain a general privacy-based challenge to Minnesota’s sodomy statute, where the defendant allegedly had engaged in sodomy as a prostitute). Because the debtors have claimed a reasonable amount of wearing apparel as exempt, the bankruptcy estate has suffered no injury in fact and therefore does not have standing to raise the constitutional issue.

3. Option to repurchase real estate.

For purposes of Minn. Stat. § 510.04, an option to purchase is an instance of “any interest” in land. Under the liberal construction of the homestead statute, an individual interest in a family farm corporation having an interest in land, is the same as a direct individual interest in land. As the Minnesota Supreme Court said,

This state has long recognized the importance, notwithstanding the just demands of creditors, for a debtor's home to be a "sanctuary." *Denzer v. Prendergast*, 267 Minn. 212, 216, 126 N.W.2d 440, 443 (1964). This "wise and humane policy" is not just for the debtor's benefit, but is also "in the interest of the state, whose welfare and prosperity so largely depend upon the growth and cultivation among its citizens of feelings of personal independence, together with love of country and kindred--sentiments that find their deepest root and best nourishment where the home life is spent and enjoyed." *Ferguson v. Kumler*, 27 Minn. 156, 159, 6 N.W. 618, 619 (1880). The importance of protecting the homestead is further illustrated by recent laws imposing a moratorium on the foreclosure of certain mortgages and contracts for deed when the property involved qualifies for homestead tax treatment. Minn. Stat. ch. 583 (1984); 1984 Minn.Laws ch. 474. Significant, too, is that the legislature has given homestead classification for real estate tax purposes to homesteads held in family farm corporations where a shareholder occupies and actively farms the land. Minn.Stat. § 273.13, subd. 6a (1984).

Cargill, Inc. v. Hedge, 375 N.W.2d 477, 479 (Minn. 1985). If debtors can claim exempt interests under the statute by reverse-piercing a corporate veil, thereby turning a personalty interest in stock into an interest in real estate, they also should be able to exempt an option interest in order to uphold the same policy considerations.

As to the separate question of whether an option is an interest in real estate for purposes of the statute of frauds, the Supreme Court has called into doubt its own decisions leading up to the case cited by the trustee, *M.L. Gordon Sash & Door Co ., v. Mormann*, 271 N.W. 2d 436 (Minn . 1978). That case is based on *Shaughnessy v. Eidsmo*, 222 Minn. 141, 23 N.W.2d 362 (1946), as to which the Supreme Court has said:

We are not asked nor required to reconsider the wisdom of *Shaughnessy* in this case and do not do so. Nor are we certain that a change in the law would affect the results here. However, we note that this court's position that options are not [interests in real estate and therefore not] within the statutes of frauds is very definitely a minority view. See, Professor Corbin's discussion at 2 Corbin, Contracts, ss 417, 418. For jurisdictions subjecting option contracts to the statute, *see, e.g., Pigeon v. Hatheway*, 156 Conn. 175, 239 A.2d 523 (1968); *Gulf Oil Corp. v. Willcoxson*, 211 Ga. 462, 86 S.E.2d 507 (1955); *Robison v. Moorefield*, 347 Ill.App. 508, 107 N.E.2d 278 (1952); *Fraley v. Null, Inc.*, 244 Md. 567, 224 A.2d 448 (1966); *Nason v. Morrissey*, 218 Miss. 601, 67 So.2d 506 (1953); *Stevenson v. Titus*, 332 Pa. 100, 2 A.2d 853 (1938); *Watkins v. Arnold*, 60 S.W.2d 476 (Tex.Civ.App.1933); *McGuirk v. Ward*, 115 Vt. 221, 55 A.2d 610 (1947); *Bratt v. Peterson*, 31 Wis.2d 447, 143 N.W.2d 538 (1966).

Rooney v. Dayton-Hudson Corp., 310 Minn. 256, 265 n.5, 246 N.W.2d 170, 175 (1976).

In any event, in *Mormann*, as in *Schaughnessy*, the court applied the law to reach a result that protected the option holder, reflecting the same policy considerations expressed in *Cargill v. Hedge, supra*. This Court's decision should have a similar effect.

The debtors have briefed similar issues in response to the First Federal Bank's objection to exemptions, scheduled for hearing on the same date, and the responses on the option issue should be read together. A copy each responsive memorandum has been served on each objecting party.

4. Slander of title.

On close analysis, this may be an exclusion issue under § 541(a) rather than an exemption issue.

In the state court litigation with First Federal Bank, the debtors have asserted two counterclaims. One, for declaratory judgment that a purported \$171,000 mortgage is null and void, merely seeks a declaration of rights and does not add to or detract from the aggregate interests of the debtors, whatever they may be. The bankruptcy Schedule D lists the bank's mortgage claim as disputed.

The other counterclaim, at issue in the present motion, asserts slander of title. The slander of title claim does not add much to the declaratory judgment claim. In the absence of a claim for punitive damages, which has not been asserted thus far, the debtors anticipate that their only recovery under the slander of title claim would be attorneys fees and related costs to clear title. *Paidar v. Hughes*, 615 N.W.2d 276 (Minn. 2000).¹ Because the state court case has been commenced but not decided, there are some prepetition fees accrued and paid, and there will be some future fees accrued and paid. The debtors concede that the trustee has the right to recover any prepetition fees accrued and paid and ultimately recovered from the bank, but note that because they will be paying post-petition fees to take the declaratory judgment claim to completion, that portion of any slander of title recovery will accrue post-petition and therefore will belong to them under 11 U.S.C. § 541(a)(1).

5. Potential claim for emotional distress

Prior to filing this case, the debtors considered whether they had claims for emotional distress against First Federal Bank, but decided to defer the evaluation of them. Because no claim has been pled to date, the discussion is somewhat hypothetical. However, the elements of

¹ The debtors do not object to this Court reserving jurisdiction to consider the exempt or § 541(a) status of additional claim elements, if they come to light.

such a claim are clearly and intensely personal, thus the claim is for injury to the person, and therefore exempt under Minn. Stat. § 550.37 subd. 22.

Tort claims seeking damages for mental distress generally have not been favored in Minnesota. We have been careful to restrict the availability of such damages to those plaintiffs who prove that emotional injury occurred under circumstances tending to guarantee its genuineness. With regard to a defendant's intentional conduct, the general rule in this state has been that compensatory damages for mental distress are only available if the emotional injury is accompanied by a contemporaneous physical injury, or in cases involving the invasion of a legal right which by its very nature is likely to provoke a severe emotional disturbance. This rule was most recently stated by this court as follows:

It is well established that damages for mental anguish or suffering cannot be sustained where there has been no accompanying physical injury; unless there has been some conduct on the part of defendant constituting a direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious misconduct.

State Farm Mutual Automobile Ins. Co. v. Village of Isle, 265 Minn. 360, 367, 122 N.W.2d 36, 41 (1963) (citations omitted). The requirements that the mental distress be accompanied by physical injury or be the natural result of some other actionable tort provide added assurance that the alleged emotional injury actually occurred and was intentionally inflicted.

Hubbard v. United Press International, Inc., 330 N.W.2d 428, 437-38 (Minn. 1983).

6. Excess amount of farm machinery and equipment

As the debtors indicate in their schedules, they agree that they owe a cash payment to the bank and/or trustee to the extent that their exemption list exceeds \$26,000.

7. Conclusion

For these reasons, the Court should uphold the debtor's exemption claims with the exceptions and modifications indicated in this memorandum.

Alternative request for certification to Minnesota Supreme Court

Minnesota Statutes § 480.065 subd. 3 provides that:

The supreme court of this state may answer a question of law certified to it by a court of the United States or by an appellate court of another state, of a tribe, of Canada or a

Canadian province or territory, or of Mexico or a Mexican state, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state.

In deciding whether to certify the question, the Court should be guided by the considerations set forth in *Hatfield v. Bishop Clarkson Memorial Hospital*, 701 F.2d 1266, 1267 (8th Cir. 1983):

The United States Supreme Court in *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974) held that use of a state's certification procedure "rests in the sound discretion of the federal court." The Court determined that although a federal court was not required to resort to certification, certification was "particularly appropriate in view of the novelty of the question" and the unsettled nature of state law. *Id.* at 391, 94 S.Ct. at 1744. See also *Clay v. Sun Insurance Office*, 363 U.S. 207, 212, 80 S.Ct. 1222, 1225, 4 L.Ed.2d 1170 (1960). Because of the unsettled nature of Nebraska law on this issue and because a determination of this issue could be dispositive of this case, the issue is appropriate for certification to the Nebraska Supreme Court. *Elkins v. Moreno*, 435 U.S. 647, 668, 98 S.Ct. 1338, 1350, 55 L.Ed.2d 614 (1978).

As for the ring/jewelry and homestead option issues, these considerations strongly militate in favor of certifying the present question in lieu of denying the exemptions. The wedding ring issue has been bobbing around the bankruptcy courts and resulting in one or more unreported decisions, resulting in much distress to debtors and, one assumes, relatively little money to estates. The general question of whether a state statute passes muster under the state constitution, obviously is an appropriate one for the Supreme Court. The Supreme Court has called its own caselaw into question, regarding real estate options, and it is unlikely that judicial language regarding interests in real estate, for statute of fraud purposes, should have the same effect as statutory language defining a homestead.² Therefore, debtors make this alternative

² Nevertheless, the undersigned believes this Court is amply competent to take a first run at these issues. However, a request for certification now is necessary in order to avoid waiver of this procedural option. *Rural Water System v. City of Sioux Center*, 202 F.3d 1035, 1037 n.6 (8th Cir. 2000).

request for certification, and for leave to file a proposed certification order when directed to do so by this Court.

Respectfully submitted,

/e/ Kurt M. Anderson

Kurt M. Anderson # 2148

Attorney for Debtors

P.O. Box 2434

Minneapolis, Minnesota 55402-0434

(612) 333-3185

VERIFICATION

We hereby declare under penalty of perjury that we have read the foregoing response to trustee's objections to exemptions; and that the facts stated therein are true and correct.

Executed on: _____

Executed on: _____

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/s/ Kurt M. Anderson

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Executed on: 8-25-04

James Harold Jutz

Executed on: 8-25-04

Darleen Mary Jutz

Declaration of Service via Facsimile

Kurt M. Anderson respectfully declares to that on August 26, 2004, he served the following items:

Response to Trustee's Objections to Exemptions
This proof of service

Via facsimile on the following individuals or entities:

Andrew Moratzka	612-305-1414
Paul Bucher, Trustee	507-288-9342
United States Trustee	612-664-5516

VERIFICATION

I hereby declare under penalty of perjury that I have read the foregoing declaration; and that the facts stated therein are true and correct.

Executed on: August 26, 2004 /e/ Kurt M. Anderson